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IN THE

Supreme Court of the United States

OCTOBER TERM 1961

No. 465

ELIZABETH N. GRAHAM, Individually and doing business at MAINE CHANCE FARM,

Petitioner,

v.

FANNIE K. HERTZ,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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Respondent.

No. ....

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

ELIZABETH N. GRAHAM petitions for a writ of certiorari to review the decision of the Court of Appeals for the Second Circuit entered on July 3, 1961, affirming in part and in part vacating a judgment entered by the District Court after general and special jury verdicts in favor of the respondent.

Opinions Below

The opinion of the Court of Appeals (363a-74a)* is officially reported at Fed. 2d and unofficially at 4 F.R.Serv.2d 26d44. Case 1. Three other officially reported opinions in this case which were in question before the Court of Appeals are reported at 158 F.Supp. 201 reargument 168 F.Supp. 755 (63a and 79a respectively) and 23 F.R.D. 17. A fifth opinion which is not officially reported is printed at (92a).

*"App." refers to the appendix to this petition; numbers in parenthesis (000a) refer to petitioner's appendix to the Court of Appeals.

Jurisdiction

The opinion of the Court of Appeals was filed on July 3, 1961. The jurisdiction of the District Court was invoked because of diversity of citizenship, the plaintiff being a citizen of Illinois and the defendant a citizen of New York. The jurisdiction of this Court is invoked under 28 U. S. C., § 1254(1).

Rules Involved

The Federal Rules of Civil Procedure pertinent to this petition, namely rules 26(d)(3), 42(b), 46, 49 and 51, are printed in relevant part in the Appendix hereto.

Questions Presented

1. Whether the Court of Appeals, by ordering a new trial of the single issue of adding to the verdict of the previous jury the sum of $7,892.10 as interest from the date of the accident to the date of the verdict ignored the requirements of *Erie* v. *Tompkins* by failing to conform to the law of New York and deprived petitioner of her right to trial by jury within the meaning of the Seventh Amendment.

2. Whether a trial court pursuant to Federal Rule 26(d)(3) properly may permit the use of deposition testimony with the attendant deprivation of cross-examination in the absence of proof to support a finding that the deponent was not within 100 miles of the court.

3. Whether the trial court deprived petitioner of substantial rights by framing a "special verdict" which omitted

a critical issue of fact and law and failed to comply with the provisions of Federal Rule 49(a) or (b).

4. Whether in the absence of intervening circumstances the trial court pursuant to Federal Rule 42(b) properly could order a separate trial of a single issue raised by respondent's reply to a counterclaim and therein reverse on identical papers a denial of summary judgment by a coordinate judge.

Statement

(a) The Underlying Event

About 7:15 o'clock in the clear morning of October 17, 1954, respondent's race horse "Speedy Wave", being run against a stop watch, collided with petitioner's riderless horse "Star of Roses" on the training track at Belmont. Both horses were killed instantly. Two actions ensued; one by respondent's exercise boy, Wesley Brite for personal injuries (*Brite* v. *Graham,* S. D. N. Y. Civ. No. 97-240), the other, which is the present action, by respondent for the loss of her horse "Speedy Wave".

(b) The Pleadings and "Separate Trial" of the Issue of Res Judicata

Both the present action which was filed October 17, 1954, and the *Brite* action were instituted through the same firm of attorneys. Both complaints charged petitioner with (a) harboring a vicious animal, (b) harboring an animal with known tendencies requiring the taking of special precautions in its care and handling, and (c) negligent handling of petitioner's horse.

Petitioner's answers denied liability and affirmatively pleaded contributory negligence and assumption of risk. In

addition, in the present action petitioner counterclaimed that respondent's negligence caused the death of petitioner's horse "Star of Roses". Respondent, replying to the counterclaim on January 18, 1955, pleaded, among other things, the defense of assumption of the risk.

The present action was dormant while the *Brite* action proceeded to trial. The *Brite* action was defended by other counsel. That action, tried before the Honorable Archie O. Dawson and a jury in May of 1957, resulted in a substantial general jury verdict for Brite. No appeal was taken.

After the successful termination of the *Brite* action, respondent on November 1, 1957 moved, under Federal Rule 15(b): (a) for an order permitting her to serve a supplemental reply raising the defense of *res judicata* (based on the *Brite* action) and (b) for summary judgment dismissing petitioner's counterclaim on that same ground (16a). Both motions were denied by the Honorable Irving R. Kaufman on December 23, 1957 (63a, 70a). Respondent's motion for reargument was granted and summary judgment again denied on January 23, 1958 (79a, 81a). Judge Kaufman, however, stating that it couldn't prejudice anyone, granted respondent leave to file a supplemental reply pleading *res judicata* (81a, 83a).

After the case had been assigned to Hon. Richard H. Levet for trial, respondent renewed her effort for summary judgment on the counterclaim under the guise of a motion under Rule 42(b) for a separate trial without a jury, of the narrow issue of *res judicata* raised by her supplemental reply (84a). On April 21, 1960 the motion was granted and the separate trial followed immediately before Judge Levet (92a). On that "trial" respondent merely submitted the same papers that had been before Judge Kaufman twice on the motions for summary judgment two years earlier (33a-82a). Judge Levet, nevertheless, reversed

Judge Kaufman's decision by filing an opinion that same day dismissing the counterclaim, denying finality, and refusing certification of an appealable question (96a). The Court of Appeals, agreeing with Judge Levet and disagreeing with Judge Kaufman concerning the applicability of *res judicata* to petitioner's counterclaim, affirmed the dismissal. In so doing it denied that Judge Levet was bound by any "law of the case" and thereby for all practical purposes destroyed that doctrine as a viable concept in the Second Circuit.

The trial of the other issues followed before Judge Levet on April 25, 26, 27 and 28, 1960 (106a).

(c) Plaintiff's Proof at Trial

Respondent endeavored to support her claims by introducing the testimony of two live witnesses and three depositions imported from the *Brite* action.* The Court of Appeals has found, however, that the "testimony tending to show that [petitioner] had been guilty of negligence came entirely from [the] three depositions".**

Of the five witnesses, both live ones, respondent's exercise boy Brite and her trainer Parke, were present on the training track on the morning of the accident, as was O'Neil, one of the *Brite* action deposees. The other two depositions from the *Brite* action, those of Cochrane and Griffiths, were

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*Although respondent's counsel was the same in both actions, which were instituted simultaneously, notices of the *Brite* action depositions were never given to us as attorneys for petitioner in this action.

**Since the Court of Appeals ignored the issues of absolute liability and higher standard of care in its opinion we do not know its views with respect to evidence supporting those issues. We believe, however, that the claims of absolute liability and the keeping of an animal with propensities requiring a higher standard of care also depended entirely upon the same three depositions. It is the only such evidence in the case.

concerned solely with the habits of petitioner's horse "Star of Roses" prior to the accident.* Neither of the live witnesses offered testimony as to how or why the accident occurred or as to any special habits or tendencies of petitioner's horse or its prior conduct on the morning of the accident.** The

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*The O'Neil deposition also contained such testimony. See footnote—pages 21-22, infra.

**Since there was no dispute that a collision between the two horses did occur and resulted in the death of both, the critical facts at issue concerned the duty each owner owed to the other in the circumstances surrounding the accident; the maner of handling race horses at the training track and the knowledge of the risks of the sport which guided the respective employees of the parties in such handling.

Respondent's live witnesses, Brite and Parke, testified that Brite rode "Speedy Wave" to the Belmont training track in the company of Parke, the trainer, and Paul Miller, another exercise boy, both of whom were mounted (120a). They planned to breeze (run the horse a measured distance against a stop-watch) "Speedy Wave" that morning.

The trio entered the training track between the ¼ pole and the 3/16th pole (counter-clockwise from the mile pole). As they came upon the track two men and a horse ("Star of Roses") were standing at the inside rail, 90 to 100 feet across the track. "Star of Roses" was riderless; being held on a shank (a chain and leather lead) by one of the two men standing alongside.

Respondent's trainer, Parke, upon viewing the riderless horse and two men at the inner rail thought that the exercise boy had been "throwed" and that the horse was unruly (186a). Although conceding this knowledge (186a) Parke did not alter his plan to breeze "Speedy Wave" between the 3/8th pole and the mile pole; the one place on the mile long training track where he knew "Star of Roses" was being "unruly". Moreover, Brite, who was riding "Speedy Wave" didn't even give thought to the conduct of "Star of Roses" (154a).

With apparent clairvoyance, trainer Parke shouted to the men at the inside rail "You better get that horse off the track before you get run over" (174a). Nothing was said to Parke in response (174a). Instead, an exercise boy mounted "Star of Roses" who was then led by the other man across the track to the outside rail (121a). Thereafter, Parke and his exercise boys walked their horses slowly counter-clockwise on the training track toward the mile pole. In so doing, they passed within 10 or 15 feet of "Star of Roses" who was then at the outer rail. Parke said nothing about his intention to breeze "Speedy Wave", nor did he indicate that he intended to breeze

O'Neil deposition, therefore, was most critical to respondent's case on simple negligence since he was the only witness to "Star of Roses" behavior on the morning of the accident.* Exclusion of the depositions would have necessi-

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only at that particular portion of the mile long track (144a, 146a). Neither Brite nor Parke saw any other horse being breezed.

Parke took up a position with a stop watch at the 1/16th pole while Brite continued around the track on "Speedy Wave". Brite thereafter gradually increased the gait. He galloped "Speedy Wave" to about the 3/8th pole, and while standing in the stirrups, looked across the infield toward "Star of Roses". Brite saw that "Star of Roses" was still being quiet and held on a shank by someone at the outside rail (166a-67a). It does not appear that he again bothered to look ahead toward "Star of Roses".

Just before he reached the 3/8th pole, some 7 or 8 minutes after he started around the track, Brite "broke" "Speedy Wave" into a run and crouched flat on her back (123a) in a position where he could "glance back and forth and watch" (123a). Brite could see over and across the inside rail, if he looked (126a, 166a). In any event, just before he reached the 3/16th pole, about 12 seconds later, he saw a loose horse 10 or 15 feet away coming toward him "on the rail". The two collided (124a).

Parke added little to Brite's description of the event except to indicate that Brite apparently was not looking where he was going (175a). Upon seeing the collision, Parke galloped to the dead horses and then went on to look for the "man who had a hold of that horse" ["Star of Roses"] (176a). He could not find him although he testified that the man was still holding "Star of Roses" a little more than 11 seconds before (180a, 190a).

*Other than testimony previously noted concerning "Speedy Wave's" entrance upon the track, Parke's belief that "Star of Roses" was unruly at that time, and the actual collision, the only testimony concerning "Star of Roses' " behavior earlier in the day was from the O'Neil deposition (296a-298a). O'Neil stated that "Star of Roses" came on the track the morning of the accident with an exercise boy on his back. The handlers turned him loose and "He ran his usual procedure, 100 yards or so and then propped and wheeled and dumped the boy. He wheeled around, ran half the way back and was caught" (297a). O'Neil then saw defendant's handlers put a shank on "Star of Roses" and take him to the outside rail (298a).

There is no other testimony of "Star of Roses' " behavior prior to the accident that morning. In particular, none of respondents witnesses gave any testimony as to how "Star of Rosses" got loose; whether he was turned loose, or broke away or whether the shank was still attached to him when he was killed.

tated a dismissal of the action or a directed verdict in favor of petitioner.

Petitioner strenuously objected to the use of these critical depositions upon the ground that there was no showing that the deponents were unavailable as required by Federal Rule 26(d)(3); that cross-examination of these witnesses was critically necessary; and, that the content of the testimony which the Court was editing was highly prejudicial. These objections and the trial courts' handling of them are set forth in detail in our discussion of Question 2, (infra, pp. 13 et seq.). Hence, we merely note here that the trial court overruled the objections and permitted the use of all three depositions as edited.

The Court of Appeals affirmed on the ground that the requirements of Federal Rule 26(d)(3) were met.

(d) The General and Special Verdicts

Shortly before charging the jury, the trial court presented counsel with a complex set of questions which was denominated a "special verdict". This "special verdict" (102a) which the court called a "long laundry list" (358a) was comprised of many conclusory questions. Counsel was requested to make objections immediately. This resulted in rampant confusion which is clearly manifested in the colloquy of court and counsel (330a-340a). The net result of this last-minute effort by the court to utilize a "special verdict" was the omission of any question concerning respondent's assumption of the risks attendant upon use of a training track.

The jury filled out the "special verdict" submitted by the court and also returned a general verdict in the sum of $27,300 against the petitioner. Petitioner argued on appeal that the trial court's use of the "special verdict" in this case was improper and prejudicial and eliminated from jury consideration a critical issue on which considerable evidence

had been adduced, namely, assumption of the risk. The Court of Appeals completely ignored this argument.

(f) The Addition of Interest to the Verdict

Subsequent to the verdict, the clerk did not enter judgment forthwith pursuant to the provisions of Federal Rule 58. Instead, the trial court several days later signed respondent's proposed formal judgment which included interest for the period between the date of the accident and the date of the verdict in the sum of $7,892.10 (102a). The Second Circuit vacated the award of interest and remanded the case to the District Court "for trial by jury of the issue of the discretionary award of interest on the amount of the respondent's loss as found by the previous jury."

Reasons for Granting the Writ

This petition presents a number of questions which are essentially unrelated in law. Their sole identity is that they arise in the same case. In our ensuing discussion, therefore, we have treated each question presented as a separate entity and on its own merits. Nevertheless, we believe the petition as a whole presents important questions of federal practice and procedure important to all litigants as well as conflicts of decision that should be resolved by this Court.

(a) As to Question 1.

1. The decision of the court below ordering a new trial of the single issue of adding interest to the verdict of a previous jury is directly in conflict with the decision of the Court of Appeals of the State of New York in *Purcell v. Long Island Daily Press Publishing Co.*, 9 N.Y.2d 255 (1961).

In the *Purcell* case, the New York Court of Appeals held that the trial court's addition of interest to the verdict must be stricken from the judgment upon the ground that the jury "must award it to them, and if plaintiff had asked for

it here, he might well have received it" (p. 259). In reaching its decision the New York court reiterated the rule of *Wilson* v. *City of Troy*, 135 N.Y. 96 (1892) "that the award of interest in a negligence action was for the jury to determine."

The Second Circuit in the present case, instead of striking the allowance of interest as the New York court did in *Purcell*, remanded that single issue to a new jury. It reasoned as follows:

> "The lower New York courts, as indeed did we, *Newburgh Land & Dock Co.* v. *Texas Co.*, *supra*, and various commentators, 69 Harv. L. Rev. 1158 (1947), gathered from a dictum in *Flamm* v. *Noble*, 296 N.Y. 262, 268 (1947), that the New York Court of Appeals regarded its previous decisions on interest as 'manifestly unsound' and would reverse its prior rulings which had allowed interest as a matter of right in actions for conversion, but had left interest in actions for negligence to the determination of the jury.
>
> * * *
>
> ". . . we do not think that the plaintiff should suffer by reliance upon our earlier interpretations of New York law in being deprived of the chance of a discretionary award of interest by the jury."

The Second Circuit's observation that the plaintiff below "relied" on "earlier interpretations" of New York law is at best speculative and at worst sheer rationalization. In any event, the New York Court in *Purcell* rejected an identical argument (9 N. Y.2d at p. 258):

> "Plaintiff contends that the 'courts of this state have consistently followed the rule suggested by this court in *Flamm*.' *But this is not so.*
>
> * * *
>
> "It should be stressed, of course, that by preserving the law in its present posture the principles of justice and fairness are not offended, for those whose property is destroyed or damaged by the negligent

> conduct of others may still recover interest. The jury, however, must award it to them and, if plaintiff had asked for it here, he might well have received it.
>
> "Accordingly, the judgment appealed from should be modified by disallowing any interest upon the verdict of the jury, and in all other respects affirmed, without costs." (Emphasis supplied).

Thus, it is clear under *Purcell* that a new jury trial of the narrow issue of the addition of interest to a previous verdict could not be obtained in the Courts of New York.

Since the remand order of the Second Circuit in the present case effects a result different from that obtainable in the Courts of New York, it is in conflict with *Erie* v. *Tompkins*, 304 U. S. 64 (1938), *Guaranty Trust Co.* v. *York*, 326 U. S. 99 (1945) and *Ragan* v. *Merchants Transfer & Warehouse Co.*, 337 U. S. 530 (1949).

2. The submission to a second jury of the narrow question of whether interest should be added to the verdict of the first jury as ordered by the Second Circuit would deprive petitioner of the right to trial by jury guaranteed by the Seventh Amendment.

Under the Seventh Amendment petitioner is entitled to the substantive rights accorded in a trial by jury as it existed under the common law at the time the Constitution was signed, *Dimick* v. *Schiedt*, 293 U. S. 474 (1935). This Court has ruled that such guarantee includes the right to have the same jury determine all the issues in the case unless it clearly appears that one or more issues are "so distinct and separable from the others that the trial of it alone may be had without injustice." *Gasoline Products Co.* v. *Champlin Refining Co.*, 283 U. S. 494, 500 (1931). We submit that a jury's exercise of discretion in granting or withholding interest is inseparable from its exercise of discretion in fixing the total sum to be awarded as damages.

This Court recently has denied certiorari in two cases raising issues as to whether severances ordered by the trial court violated rights guaranteed by the Seventh Amendment. *Hosie* v. *Chicago & Northwestern Ry.*, 282 F. 2d 639, 642 (7th Cir. 1960) cert. den. 365 U. S. 814 (1961); *United Air Lines Inc.* v. *Wiener*, 286 F. 2d 302 (9th Cir. 1961) cert. den. — U. S. — (1961). Both cases appear to be consistent in principle and correctly decided in the circuit courts. The present case, however, conflicts in principle with both the *Hosie* and *Wiener* cases.

In *Hosie*, it was determined that the issues of liability and damages in the particular tort action were not so entwined that separate trials of those issues would work an injustice. In *Wiener*, however, it was held that claims for exemplary damages were so dependent upon the degree of culpability involved in the alleged tort that the issues of liability and damages could not be presented to separate juries without confusion and uncertainty amounting to a denial of a fair trial.

In the present case, the Second Circuit has effectively severed the issue of the amount of damages from the determination of granting or withholding interest on that amount. Certainly, these determinations are as knotted together as the issues of liability and exemplary damages which were held inseparable in *Wiener*, *supra*. We submit, therefore, that damages and interest in a negligence action are so integrated and peculiarly within the province of a jury determination as to the total sum to be awarded that such issues cannot be separated and presented to different juries without violating the guarantees of the Seventh Amendment. *Dimick* v. *Schiedt*, 293 U. S. 474 (1935); *Gasoline Products Co.* v. *Champlin Refining Co.*, 283 U. S. 494 (1931). Indeed, the Second Circuit's remand in this regard appears, when viewed as a practical matter, to be tantamount to unconstitutional additur, *Dimick* v. *Schiedt*, supra.

3. Remand of the interest issue for trial before a second jury is also in conflict in principle with the plain language of Federal Rule 51, (App., p. 31) which states in relevant part:

> "No party may assign as error the giving or the failure to give an instruction unless he objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which he objects and the grounds of his objection."

It is undisputed that respondent failed to request an instruction to the jury with respect to interest and no such instruction was given. Thus, respondent would have been foreclosed by Federal Rule 51 from seeking in the Court of Appeals the relief which that court ultimately gave. *Yoham* v. *Rose Cliff Realty Co.*, 267 F. 2d 9 (3d Cir. 1959). *Cf., Western Machine Co.* v. *Consolidated Uranium Mines Inc.*, 247 F. 2d 685 (10th Cir. 1957); *Turner Construction Co.* v. *Houlihan*, 240 F. 2d 435 (1st Cir. 1957); *Stilwell* v. *Hertz Drivurself Stations Inc.*, 174 F. 2d 714 (3d Cir. 1949). We submit therefore that the remand is improper for it affords respondent rights by indirection which she could not obtain directly.

(b) As to Question 2.

In approving the trial court's ruling that three depositions* could be read to the jury after editing by the trial court, the Second Circuit has virtually destroyed the vitality of Federal Rule 26(d)(3) as protection against trial by deposition. In relevant part Rule 26(d)(3) provides:

> "The deposition of a witness, whether or not a party, may be used by any party for any purpose *if the court finds*: 1, that the witness is dead; or 2,

*The Court of Appeals found that the "testimony tending to show that defendant had been guilty of negligence came entirely from three depositions which the District Court admitted in evidence."

> that the witness is at a greater distance than 100 miles from the place of trial or hearing, or is out of the United States, unless it appears that the absence of the witness was procured by the party offering the deposition; or 3, that the witness is unable to attend or testify because of age, sickness, infirmity, or imprisonment; or 4, that the party offering the deposition has been unable to get the attendance of the witness by subpoena; or 5, upon application and notice, that such exceptional circumstances exist as to make it desirable, in the interest of justice and with due regard to the importance of presenting the testimony of witnesses orally in open court, to allow the deposition to be used." (Emphasis supplied.)

Respondent was put on notice by the pre-trial order* and by timely objection (245a-9a) to demonstrate to the court that the depositions were usable under Rule 26(d)(3). In flat disregard of the rule and contrary to the only probative evidence on this point (*infra,* pp. 24-26) Judge Levet admitted the depositions ignoring the importance of presenting the testimony of witnesses orally in open court. We submit that the decision of the court below is directly contrary to the direction in Federal Rule 26(d)(3) that depositions should be used with "due regard to the importance of presenting the testimony of witnesses orally in open court." Cf. Federal Rule 43(a).

The critical questions, therefore are: Who has the burden of showing that a witness is unavailable; and, what proof will suffice to show such unavailability?

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*These depositions were neither noticed nor taken in the present action. Instead, they were imported from the *Brite* personal injury action pursuant to a pre-trial order, 23 F.R.D. 17, 23 (SDNY 1958), where Judge Dawson stated:

> "The plaintiff should be allowed to read the depositions taken in *Brite* v. *Graham* * * * provided however that plaintiff meets the same requirements necessary for the reading of any depositions (Rule 26(d)(3) of the Rules of Civil Procedure."

We believe the answers to these questions given in the courts below violate the plain purpose of Rule 26(d)(3) and improperly deprived petitioner of her right to oral testimony and cross-examination.

The Legal Principle Underlying Rule 26(d)

The caveat in Rule 26(d)(3) that "due regard" should be had "to the importance of presenting the testimony of witnesses in open court" is a "warning that this provision is not to be used as authority for trying cases generally upon depositions in the manner in which all equity cases were tried prior to the adoption of the Equity Rules of 1912". 4 *Moore's Federal Practice* 1194 (2d Ed. New York 1950). Professor Moore further observed with respect to this caveat (p. 1195):

> "In the Advisory Committee's Preliminary Draft there was a provision that a deposition could be used for any purpose at the trial 'if the parties affected thereby consent thereto with the approval of the court.' This provision was dropped and the present provision was substituted therefor apparently because it was feared that the court would grant its approval whenever the parties consented to the use of depositions, and thereby to that extent nullify the salutary rule that testimony of witnesses shall be taken orally in open court. That this was not an idle fear is shown by the practice of some courts under the Equity Rules of 1912, which required the testimony of witnesses to be taken orally in open court, but which permitted a departure from this rule by allowing depositions (when not permitted by general statute) to be taken for good and 'exceptional' cause. Some courts in effect treated most equity cases as 'exceptional' if counsel for the litigants agreed to the procedure of using the depositions of witnesses rather than their oral testimony in open court." (Footnotes omitted)

Oral testimony historically has been held crucial as a means of affording the trier of the fact an insight into the credibility of the witness and a basis for evaluating the testimony. See *National Labor Relations Board* v. *Dinion Coil Co.*, 201 F. 2d 484, 487-9 (2d Cir. 1952) (Frank, J.). It has been considered crucial even when the trial is by the court rather than by a jury. *Los Angeles Trust Deed & Mortgage Exchange* v. *Securities and Exchange Commission*, 264 F. 2d 199 (9th Cir. 1959).

Thus, in *Lebeck* v. *William A. Jarvis, Inc.*, 250 F. 2d 285, 295 (3d Cir. 1957) the court stated:

> "The Court's reading of edited testimony to the jury was an erroneous method of introducing evidence in a jury trial * * *. It is fundamental in common law jury trial that the testimony of witnesses on issues to be decided by the jury shall be developed through the interrogation and cross examination of witnesses in the presence of the jury. * * * The only exceptions are those which have been formalized and defined. A court may not vary this aspect of procedure at will, particularly since in cases at law in courts of the United States jury trial is a matter of constitutional right."

Accord: *Arnstein* v. *Porter*, 154 F. 2d 464 (2d Cir. 1946).

Application of Federal Rule 26(d)(3)

In *Neckwear Corp. of Puerto Rico* v. *First National Bank of New York*, 275 F. 2d 295 (1st Cir. 1960) the First Circuit held that it is the burden of the proponent of the deposition to demonstrate the existence of one of the five conditions of Rule 26(d)(3) before a deposition may be used. This decision is consistent with Professor Moore's observation that:

> "The chief change made by the Federal Rules was the removal of these conditions upon the *taking*

> and making them applicable *only upon the use* of depositions at the trial." (Emphasis in original.) 4 *Moore's Federal Practice* 1028 (2d ed., New York, 1950).*

Accord, *Engle* v. *Aetna Life Ins. Co.*, 139 F. 2d 469 (2d Cir. 1943).

In the present case, however, the Second Circuit relying on *Frederick* v. *Yellow Cab Co. of Philadelphia*, 200 F. 2d 483 (3d Cir. 1952) appears to cast the burden of Rule 26(d)(3) upon the party resisting use of a deposition. One of the stated reasons for affirmance on this issue below is that the trial court's finding is unassailable because "there was no showing at all in opposition". Obviously, "no showing" should be required if the burden is upon the proponent of the deposition. Only the proponent can be prepared on this issue since he alone knows whether or not he will offer the deposition.

We think this suggestion that the burden is upon the party resisting use of the deposition is plainly wrong. Moreover, in the present case there is no showing sufficient to shift that burden.

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*Thus, under the practice prior to the Federal Rules a deposition *de bene esse* could be taken *only* if (4 Moore's Federal practice 1020):

"1. The witness lived more than 100 miles from the place of trial, or
2. Was bound on a voyage to sea, or
3. Was about to go out of the United States, or
4. Out of the district in which the case was to be tried and more than 100 miles from the place of trial, before the time of trial, or
5. When he was ancient or infirm."

**In any event the *Frederick* case is distinguishable. There the taking of the deposition two weeks before trial was specifically to accommodate an early trial date. It included vigorous cross examination. In the present case, instead of being taken to accommodate the conduct of an impending trial, the depositions in question were imported from another action which had terminated some three years previously.

The absence of proof to satisfy the requirements of Rule 26(d)(3)

Respondent sought to meet the burden of showing that witnesses Cochrane, Griffiths and O'Neil were more than 100 miles from the Court by recalling her trainer Parke, *after* the court had permitted the reading of *all* the depositions over petitioner's objections.* A fair summary of this proof is that respondent showed that one of the deposees *actually* was in the New York area and subject to the court's process. Nothing was developed as to the other two.

Parke testified: (1) that Cochrane actually was in the New York area within reach of the court's process (307a, 310a); (2) that he was not acquainted with Griffiths and only knew O'Neill "when I see him"; (3) that he could give no information as to the last time he saw Griffiths' present whereabouts (309a); (4) that he had not seen O'Neil since 1956 at Belmont, *although O'Neil's deposition was taken in New York City on January 29, 1957* (309a); and (5) that he had made no inquiry of anyone with respect to Griffiths and O'Neil. Moreover, *Parke refused to state under oath that O'Neill was not in New York City* and testified instead that he had no personal knowledg as to O'Neil's present whereabouts (310a).

Respondent sought to make up the utter deficiency of Parke's testimony by her counsel's statement that one of his associates got in touch with the New York Racing Association which had no records of Griffiths or O'Neil, but which did have a record of Cochrane locating him in the

*More significantly respondent's counsel made no effort to locate the deponents prior to using the depositions. It is clear that he should have been required to make such inquiry since, as we have noted, whether or not he intended to use the depositions. In this regard it must be noted that respondent's counsel was able to locate and import the witness Brite from the far west.

New York area (312a). Respondent also relied upon the fact that each deposition showed a distant residence. The O'Neil deposition, however, was taken in New York and all three were itinerants.*

Faced with the proof that one deposee (Cochrane) actually was subject to process, respondent thereupon took the position that petitioner had waived her objection insofar as Cochrane was concerned (312a) despite Judge Dawson's pre-trial provision that "plaintiff should meet the requirements necessary" under Rule 26(d)(3); a fact which was called to the court's attention by defendant at the time of the objection (312a-313a).

Judge Levet having already admitted the depositions overruled petitioner's motion to strike the Griffiths and O'Neil depositions "because of the facts already indicated on the record, and I find that each witness is at a greater distance than 100 miles from the place of hearing" (316a). The Court of Appeals concurred.

In addition to approving use of the O'Neil and Griffiths depositions the Second Circuit held that the petitioner had waived the right to object with respect to Cochrane by stating the ground immediately after the testimony was introduced rather than before. Since Cochrane was actually within 100 miles of the court the issue of waiver became critical.

Petitioner had moved to strike the Cochrane testimony before any further testimony was introduced. Moreover, the trial court immediately thereafter conditionally accepted the O'Neil and Griffiths testimony subject to a motion to strike if the deponents were not shown to be outside the jurisdiction. Hence, all three depositions were in the same

*It is clear from the record that respondent's counsel made no phone calls to and wrote no letters to the witnesses in a effort to locate them.

posture before the jury. We are unable to explain why the trial court or the Court of Appeals believed the Griffiths and O'Neil testimony could be stricken yet differentiated the Cochrane testimony and found a waiver. Certainly, there was ample notice for the trial court and respondent's counsel to meet the objection and cure the defect. They failed to do so (307a-310a).

In any event we submit petitioner discharged her duty:

> "to make it clear to the court that he objects to the court's action, and to state the grounds on which he bases his objection, in order that the defect may be obviated, if possible, * * * (5 Moore's Federal Practice 1903).

Cf. Federal Rule 46; *Revlon, Inc.* v. *Buchanon,* 271 F. 2d 795 (5th Cir. 1959); *Camps* v. *New York City Transit Authority,* 261 F. 2d 320 (2d Cir. 1958).

It is our contention that there is no support in the record for the "findings" of the Courts below that the deponents were more than 100 miles from the place of trial so as to permit the use of the depositions over strenuous objection. Certainly petitioner should not be lightly be deprived of her right of cross-examination and having the jury hear and observe these witnesses.*

Live cross examination was particularly necessary here because these witnesses testified that expert horsemen would have handled petitioner's horse one way while they, qualified as experts, actually handled that horse differently and in a way consistent with his handling on the morning of the accident.* Thus **Cochrane deposed that he was an assistant trainer for petitioner from April to June preceding the October accident. He was charged with supervising the training of "Star of Roses" (234a) who was not as advanced as other horses in the stable (235a). For example, "Star of Roses" would not gallop unless he was led by a lead pony (235a). Instead, he would wheel, dislodge his rider and run off (235a). Cochrane tried for two or three weeks to train "Star of Roses" but then "laid up on him" because "he had a little soreness" as well as being a bad actor (236a).

In sum we believe the decision of the Second Circuit with respect to the showing that must be made under Rule 26(d)(3) and the shifting of all or most of the burden to the party opposing the use of a deposition constitutes a serious inroad on the protection accorded by that rule. It

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Despite these observations (239a), Cochrane, who was qualified as an expert by respondent (231a-233a), *nevertheless took "Star of Roses" to the main track at Belmont for training at least three or four times without a lead pony* (237a).

Griffiths deposed that he was a trainer for petitioner for *five days* in October, 1954 some time prior to the accident (263a) and that he was in charge of defendant's entire stable at Belmont (263a), including "Star of Roses" (267a). Petitioner, seeking his advice concerning "Star of Roses", advised Griffiths that the horse "had dislodged all riders who had ridden him" (268a). Griffiths, nevertheless, took "Star of Roses", ridden by an exercise boy, to the *main* track at Belmont (269a) where the horse trotted "very well" until they reached the 7/8 pole when he "stopped down dead" (269a). After repeatedly persuading "Star of Roses" to move as before, Griffiths finally slapped "Star of Roses" on the hindquarters with his hand (269a). "Star of Roses" "lashed out" at him. He thereupon rode over to a nearby hedge (269a), pulled a branch from it and "hit 'Star of Roses' several times across the hindquarters, until finally the horse took off into a gallop" (269a). "Shortly thereafter he dislodged his rider (269a). Griffiths then recommended gelding "Star of Roses", hiring a high caliber man to ride him (268a), and using a whip and spurs on him (271a). In making these recommendations, Griffiths was of the opinion that "Star of Roses" was a rogue, a horse that had been broken in poorly," in "incompetent hands to begin with." However, he believed a "rogue" could be "corrected" (270a). Petitioner objected to gelding upon the ground that it would destroy "Star of Roses'" sire value.

In any event, Griffiths, like Cochrane with knowledge that the horse had dislodged all previous riders (269a), *took "Star of Roses" to the track* (where the horse trotted very well) *and made certain recommendations which did not entail giving up on trying to train the horse* (271a).

O'Neil deposed that he was first a foreman and then assistant trainer for petitioner from June, 1953 to May, 1954 preceding the October accident (276a), and that during part of his employment he was charged with responsibility for training and exercising "Star of Roses" (289a-90a). O'Neil observed "Star of Roses" throw an exercise boy or jockey "practically daily" (291a) on the tracks at Belmont, including the training track (291a). On the other hand, O'Neil stated that "Star of Roses" was broken to saddle and "to ride around the shed row or anywhere else he was alone" (292a).

In these circumstances, *O'Neil, respondents' expert, like Cochrane and Griffiths, continued to take "Star of Roses" to the tracks at Bel-*

is inconsistent with the traditional right to have oral testimony and cross-examination, Cf. *Lebeck* v. *William A. Jarvis,* 250 F. 2d 285, 295 (3d Cir. 1957); *National Labor Relations Board* v. *Dinion,* 201 F. 2d 484, 487-9 (2d Cir. 1952), and should therefore be reviewed by this Court.

As to Question 3

The decision of the court below ignored three issues raised by petitioner with respect to the "Special Verdict" used by the trial court: (a) that the special verdict by including many conclusory questions failed to comply with the requirements of Federal Rule 49; (b) that by failing to include an important issue of fact and law in the special verdict the trial court obscured that issue; and (c) that the trial court, by introducing the special verdict at the last minute and requesting objections immediately, rendered it impossible for counsel to clarify the situation.

In *Cate* v. *Good Bros. Inc.,* 181 F.2d 146, 149 (3d Cir. 1950) cert. den. 340 U. S. 826 (1950) and *Thedorf* v. *Lipsey,* 237 F.2d 190, 193 (7th Cir. 1956) it is stated that it is improper under Federal Rule 49 to submit conclusory fact and law questions as distinguished from pure fact questions to a jury. In *Jackson* v. *King,* 223 F.2d 714, 718 (5th Cir. 1955) and *McDonnell* v. *Timmerman,* 269 F.2d 54, 58 (8th Cir. 1959), however, it is held that mixed questions of law and fact may be submitted if the jury is properly instructed.

In the present case the trial court promulgated a confusing set of mixed questions of law and fact (102a-105a). We submit that these questions illustrate the desirability of the *Cate* and *Thedorf supra,* limitation of questions to fact issues. The questions here are so complex that the court itself called it a "long laundry list". The colloquy

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mont, apparently without a shank or lead pony, in an effort to train him (292a). O'Neil also observed others, presumably his successors in authority, take "Star of Roses" to the track to train him between July and October, 1954 (296a).

between court and counsel clearly indicates the rampant confusion and the fact that neither the court nor counsel could understand the questions or their interrelationship (330a-340a). It resulted in the Court omitting entirely the question of the assumption of risk from the special verdict and riding roughshod over counsel's efforts to clarify the situation (337a-40a). The net result was that the issue of assumption of the risk was not submitted to the jury in any form on the special verdict. This omission was gross error because the jury upon reviewing the special verdict and answering the manifold questions (102a-05a) could never give any consideration to the risks attendant upon use of the training track. The evidence concerning these risks was extensive. The omission is also contrary to the scheme of Rule 49(b) which contemplates the submission of all fact issues to the jury.

The trial court introduced the "special verdict" to accompany the general verdict on the last day of trial. As we have noted, it was a confusing document to both Court and Counsel (330a-340a). Nevertheless, the Court requested objections immediately and was impatient with efforts to clarify the situation (337a-40a). Last minute introduction of the Special Verdict violated petitioners right of fair and adequate notice. See *Clegg* v. *Hardware Mutual Gas Co.*, 264 F. 2d 152, 157 (5th Cir. 1959).

As to the Question 4

The decision of the court below affirming the trial court's dismissal of petitioner's counterclaim* after a co-

*At the outset of this discussion, we note that the court below based its decision on this issue at least partly upon the fact that the jury, in its answer to the "special verdict" found petitioner negligent and respondent free from contributory negligence. The court reasoned, therefore, that even if the counterclaim had gone to the jury instead of being dismissed, the result would have been the same. Aside from being necessarily speculative and hindsight, this argument assumes the correctness of the rulings with respect to use of the deposition testimony and the use of the so called "special verdict" as well as the

ordinate judge had twice denied such relief on identical papers is directly in conflict with the decisions of the Third Circuit in *United States* v. *Wheeler* 256 F.2d 745 (1958) and *T. C. F. Film Corporation* v. *Gourley*, 240 F.2d 711 (1957) and in conflict in principle with the Ninth Circuit in *Beedy* v. *Washington Water Power Co.*, 238 F.2d 123 (1956). It appears to be in accord, however, with the Ninth Circuit decision in *Castner* v. *First National Bank of Anchorage*, 278 F.2d 376 (1960).

In addition to presenting a conflict of decision with other circuits, the decision of the Court below expressly eliminates "law of the case" as a viable doctrine in the Second Circuit:

> "If we thought that Judge Levet was right in his ruling, we could not sensibly upset his decision on the ground that he should have accepted Judge Kaufman's order on the same matter in the motion Judge Kaufman had previously determined. The district court's "law of the case" was not our "law of the case"; and certainly it was not the "law of the case" of the Supreme Court. See *White* v. *Higgins*, 116 F.2d 312, 317 (1st Cir. 1940). It may be conceded to be unseemly for judges of co-ordinate jurisdictions to "review" one another's decisions, and ordinarily they do not do so. Yet in the past we have refused to reverse a case for the purpose of protecting the judicial sensibilities of the judge who first made a ruling on the matter. See *Dictograph Products Co., Inc.* v. *Sonotone Corp.*, 230 F.2d 131, 231 F.2d 867 (2d Cir. 1956), which, we assume, has substantially impaired the apparently stronger statement in *Commercial Union of America, Inc.* v. *Anglo-South American Bank Ltd.*, 10 F.2d 937 (2d Cir. 1925)."

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propriety of submitting the issue of absolute liability to the jury. If any of these rulings were erroneous, as we argue here, then the dismissal of the counterclaim should also be reversed. In any event, we also urge here, of course, that Judge Kaufman was not only right but that protection of the doctrine of law of the case is sufficiently important to warrant reversing the dismissal of petitioner's counterclaim. Indeed, a different jury might find for the petitioner.

We submit that this decision is nothing less than a hunting license for any litigant dissatisfied with a ruling against him to go out and find a coordinate judge who disagrees with the first judge. Nothing could be more expensive to litigants or disruptive of sound procedure.

In *United States* v. *Wheeler*, supra, the Third Circuit held that it is an abuse of discretion for a second judge to give reconsideration to a decision of a coordinate judge in the absence of changed circumstances or the unavailability of the first judge. In so doing, it expressly disapproved judge shopping and noted its conflict with the Second Circuit (p. 748):

> "[W]e apparently are at odds with the Second Circuit in Dictograph Products Co. v. Sonotone Corp., supra. But if the second judge has as much chance of being in error on the merits as has the first judge in considering the same question, we fail to see why the fortuity (if it can be called that) of the second judge being right in the eyes of the appellate court should affect the operation of the rule designed to prevent shopping about by the defeated party for a judge more favorably disposed to whom a petition for reconsideration may be presented."

In *Castner* v. *First National Bank of Anchorage*, 278 F. 2d 376 (1960) the Ninth Circuit squarely disagreed with the Third Circuit by holding that "the second judge did not abuse his discretion in reversing the orders of the first judge" (p. 381). In reaching its decision, the Court apparently was impressed by the prospect that the second judge could, by overruling the first judge, eliminate long and expensive litigation and facilitate early appeals (p. 380):

> "The second judge must conscientiously carry out his judicial function in a case over which he is presiding. He is not doing this if he permits what he believes to be a prior erroneous ruling to control the

> case. He can settle the questions presently without compelling the parties to proceed with what may be a futile and expensive trial."

Curiously, the Court then proceeded to reverse, thus saddling the litigants with the costs of an appeal which would have been unnecessary if the second judge had adhered to the ruling of the first. In any event, the Third Circuit in *United States* v. *Wheeler*, supra, expressly rejected such reasoning (p. 748):

> "We are driven to the conclusion that the result in the Dictograph Products case was conditioned by the appellate court's conviction that the second judge had been right in discussing the complaint whereas the first judge had been wrong in not doing so. The case really presents an argument favoring allowance of appeals from the denial of interlocutory orders which if granted would end the litigation, rather then requiring the case to wind through trial to find that the interlocutory order was in error and that the trial had been unnecessary."

The Court then held, as noted above, that it is an abuse of discretion for a judge to review a ruling of a prior judge.

We submit that the Third Circuit rule is the preferable rule. The case at bar is an excellent illustration since it involves dismissal of a counterclaim arising out of the same accident. There was therefore, no possibility that the parties could be spared the expense of trial.*

More importantly the present case is a particularly clear cut example of the "judge shopping" condemned by the Third Circuit.

Petitioner's counterclaim in negligence for the value of her horse, "Star of Roses" was dismissed by the trial court (Levet, D. J.) after a so-called "separate trial" (92a-95a)

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*Indeed petitioner requested the trial court to certify a question for purposes of an interlocutory appeal but the request was denied.

which was nothing more than respondent's third identical effort for summary judgment (see 16a, 72a, 89a, 94a).

Judge Levet based his dismissal upon the notion that the general verdict against petitioner in *Brite* v. *Graham* was *res judicata* on the issue of respondent's negligence despite the fact that respondent was not a party to the prior action. This theory previously was twice rejected in well considered opinions by Judge Kaufman who denied respondent's earlier motions for summary judgment (63a, 79a).

Judge Kaufman properly held in both opinions that it was impossible to determine whether the jury's general verdict in the *Brite* action was based on negligence or absolute liability. He found that both issues were submitted. If the *Brite* jury could have assessed liability on the absolute liability theory (69a, 79a, 97a), then petitioner's counterclaim based on respondent's negligence, which was not in issue on the absolute liability theory, could not be dismissed on the ground of *res judicata*.

With the obvious purpose of circumventing Judge Kaufman's decisions, respondent moved on April 6, 1960, after assignment before Judge Levet, for a separate trial of the issues of *res judicata* pleaded in petitioner's supplemental reply (84a). In support of her motion respondent utilized the identical exhibits used on the motions for summary judgment (91a). The attorney's affidavit in support of the motion merely recites the papers to be used at the separate trial and conclusions concerning shortening of the trial and prejudice to plaintiff. Despite such an obvious device to have a third try at summary judgment, Judge Levet granted the motion for a separate trial (92a) on April 21, 1960. He immediately proceeded to hear that trial which consisted of merely accepting the pleadings, judgment and charge previously used on the motions for summary judgment (92a-95a). Upon receipt of the documents, the

court directed that the counterclaim be dismissed on the merits (95a); read into the record a previously prepared opinion (96a-98a); and denied certification for purposes of an interlocutory appeal.

Peculiarly, the opinion discloses no reason for granting severance under Rule 42(b) (96a-99a). Judge Levet dismissed defendant's counterclaim on the ground that whereas Judge Kaufman could not be certain as to the basis for the jury verdict in the *Brite* action, he, Judge Levet, had no doubts whatsoever.* He therefore granted summary judgment because of *res judicata*.

We believe that this Court should determine the propriety of review by coordinate judges and resolve the conflict between the circuits on this issue. Moreover, the ready availability of coordinate review is a disruptive aspect of federal practice significant to all litigants.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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*The Court of Appeals held that when the *Brite* charge is read as a whole it is evident that the case went to the jury on a negligence theory. Judge Levet, however, concluded (97a):

> "The issues in the Brite action determined in favor of Brite were:
>
> "(1) That Mrs. Graham's horse was vicious;
>
> "(2) That Mrs. Graham knew the horse was vicious;
>
> "(3) That Mrs. Graham was negligent;
>
> "(4) That the collision did not arise from any risk which Brite had assumed;
>
> "(5) That Brite was free from contributory negligence."